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In The
Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS
AND THE STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

OPPOSITION OF MASSACHUSETTS AND NEW JERSEY TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly found, consistent with the Environmental Protection Agency's ("EPA") longstanding and unwavering interpretation, that the Clean Air Act unambiguously requires EPA, in setting national ambient air quality standards for an air pollutant, to consider only the effects on public health or welfare that may be anticipated from the presence of such air pollutant in the ambient air.

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BRIEF IN OPPOSITION FOR PETITIONERS COMMONWEALTH OF MASSACHUSETTS AND STATE OF NEW JERSEY

Petitioners Massachusetts and New Jersey file this brief in opposition to the conditional cross-petitions of American Trucking Associations, Inc., *et al.* ("ATA Cross-Pet.") and Appalachian Power Co., *et al.* ("App. Pwr. Cross-Pet.").

Although the two cross-petitions frame the question presented somewhat differently, both cross-petitions ask this Court to enlarge the set of factors EPA considers in setting National Ambient Air Quality Standards ("NAAQS") under sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408-09. In doing so, cross-petitioners ask this Court to disturb the interpretation of these provisions that has prevailed – in EPA, in the courts, and in Congress – since the provisions were written thirty years ago. The law as to the issues raised by cross-petitionersis so well-settled and consistent, and so plainly correct, that cross-petitioners' challenge to it does not present an issue worthy of this Court's review. Moreover, far from helping this Court to avoid a constitutional issue, the varied and conflicting reinterpretations of the Clean Air Act proferred by cross-petitioners would nourish the very constitutional issue cross-petitioners purport to avoid.

STATEMENT

Massachusetts and New Jersey provided a Statement of the Case in their petition and thus will focus here on matters relevant to the conditional cross-petitions.

1. Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408-7409, direct the Administrator of the EPA to set and periodically revise the NAAQS for a limited subset of air

pollutants. Section 109 defines the NAAQS as standards "the attainment and maintenance of which in the judgment of the Administrator, *based on such criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (emphasis added). "Criteria" refers to the air quality criteria that section 108 requires the Administrator to issue before setting the NAAQS. These criteria must reflect "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air . . ." 42 U.S.C. § 7408(a)(2). Section 109 provides that NAAQS "may be revised in the same manner as promulgated." 42 U.S.C. § 7409(b)(1).

2. EPA has, beginning in 1971 with the very first NAAQS issued under the then-new Clean Air Act, consistently interpreted the Act to preclude the agency, in setting NAAQS, from considering factors other than the effects on public health or welfare caused by the presence of the relevant air pollutant in the ambient air. National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8186, 8186 (1971). EPA adhered to this interpretation in the rulemakings at issue in this case. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,683 (1997) ("PM Final Rule").

3. The court below unanimously rejected cross-petitioners' claim that EPA had erred in construing the Clean Air Act as precluding the Agency's consideration of factors other than the effects on public health or welfare caused by the presence of the relevant air pollutant in the ambient air. (Pet. App. 17-20). The panel relied on the circuit's own precedent, which has consistently rejected virtually identical industry claims in more than twenty years of challenges to EPA-promulgated NAAQS. See *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ("*Lead Industries*"); *American Petroleum Inst. v. Costle*,

665 F.2d 1176 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. EPA*, 902 F.2d 962 (D.C. Cir. 1990). Cross-petitioners did not seek *en banc* review of the question they ask this Court to hear. This Court has repeatedly denied *certiorari* on the issues presented by cross-petitioners (ATA Cross-Pet. 5-6), including denying *certiorari* in *Lead Industries* itself. 449 U.S. 1042 (1980).

REASONS FOR DENYING THE PETITION

In this case, the D.C. Circuit adhered to its longstanding conclusion that the Clean Air Act does not permit EPA to consider factors other than the direct public health or welfare effects of air pollution in setting the NAAQS. This decision creates no conflict either with decisions of this Court or with other decisions of the D.C. Circuit (the only lower court with jurisdiction over nationwide Clean Air Act rules, 42 U.S.C. § 7607(b)(1)). Moreover, Congress has had ample opportunity to reconsider the interpretation of the Clean Air Act embodied in the court's opinion, and has never done so even though it has twice substantially amended the Act, including amending the very provisions at issue in this case. Finally, EPA's construction of those provisions is clearly correct in light of the plain meaning of the relevant statutory language. The well-settled questions presented by cross-petitioners do not, therefore, warrant this Court's review.

1. Cross-petitioners do not claim that the decision below presents a circuit conflict. Nor could they in light of the D.C. Circuit's exclusive jurisdiction to review challenges to EPA's promulgation of NAAQS under the Act (see 42 U.S.C. § 7607(b)(1)) and that court's consistent rulings during the past two decades on the precise issue presented by the cross-

petition.[1] The D.C. Circuit has repeatedly upheld EPA's position that the Clean Air Act permits the Agency, in setting the NAAQS for an air pollutant, to consider only the effects on public health or welfare that may be anticipated from the presence of such air pollutant in the ambient air.[2] And this Court has denied *certiorari* on every occasion that further review has been sought on the issues discussed in the cross-petitions. See *Lead Industries Ass'n v. EPA*, 449 U.S. 1042 (1980); *St. Joe's Minerals Corp. v. EPA*, 449 U.S. 1042 (1980); *American Petroleum Institute v. Gorsuch*, 455 U.S. 1034 (1984); *American Iron and Steel Institute v. EPA*, 498 U.S. 1082 (1991). The lower court in this case merely followed settled, longstanding precedent.

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[1]Cross-petitioners wrongly claim that the D.C. Circuit's decisions in *Lead Industries*, 647 F.2d 1130, adhered to in this case, and in *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"), are inconsistent with each other. (App. Pwr. Cross-Pet. 16; ATA Cross-Pet. 17-18; *see also* Brief of State Respondents in Support of Cross-Petitions 9-13 ("Ohio Brief in Support").) *Vinyl Chloride* itself reconciled its holding with *Lead Industries* (see 824 F.2d 1146, 1158-59), and reasonably so: not only did the two cases involve two different statutory provisions, but they involved two different agency approaches to those different provisions. Of course, even if there were such a split within the circuit, the most appropriate vehicle for resolving it would be *en banc* review, not review in this Court (see *Davis v. United States*, 417 U.S. 333, 340 (1974)), and cross-petitioners declined to seek the former.

[2]See *Lead Industries*, 647 F.2d 1130 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. EPA*, 902 F.2d 962 (D.C. Cir. 1990).

Cross-petitioners nonetheless argue that review is now warranted based on their assertion that the D.C. Circuit's ruling presents a "conflict" with the decisions of this Court. They do not, however, rely on any recent decisions of this Court. They rely instead on three rulings of this Court issued between 16 and 20 years ago, which were the basis of some of the prior unsuccessful efforts at obtaining the Court's review. ATA Cross-Pet. 16-18, citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*"); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); and even *INS v. Chadha*, 462 U.S. 919 (1983).

None of these three cases, moreover, supports cross-petitioners' most recent request for review. There is no merit to the suggestion that the lower court's interpretation of the Clean Air Act is in tension with the plurality opinion in *Benzene* because the court below did not look "through the lens of constitutional avoidance." (ATA Cross-Pet. 16.) Given that cross-petitioners' responses to the petitions for *certiorari* asserted that the D.C. Circuit's invocation of the nondelegation doctrine correctly followed *Benzene* (ATA Resp. 12; *see also* App. Pwr. Resp. 14-15), it is odd that cross-petitioners now criticize the D.C. Circuit for inconsistency with *Benzene*. Nor is cross-petitioners' reliance on *Chevron* any more persuasive: if cross-petitioners (arguing as respondents) are to be believed, the D.C. Circuit's decision was simply a "work-a-day" remand under *Chevron*. (ATA Resp. 14; *see also* App. Pwr. Resp. at 15.) In any event, nothing in *Benzene* or *Chevron* requires or permits a court to distort the language, structure, and history of a statute the way cross-petitioners would have this Court do in this case. Finally, the lower court's reliance on legislative history does not create an inconsistency with *INS v. Chadha*, 462 U.S. 919 (1983), justifying this Court's review. Not only is the court's interpretation of the Clean Air Act amply supported by the plain language and structure of the statute,

quite apart from its legislative history, but reliance on legislative history is certainly not an automatic trigger for *certiorari*, let alone for condemnation. See, *e.g.*, *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 2000 U.S. LEXIS 2195 (March 21, 2000).

Further counseling against this Court's review is the fact that Congress has rejected invitations to reverse EPA's longstanding interpretation by changing the relevant statutory language. See *Lead Industries*, 647 F.2d at 1150, n. 39. Instead, Congress has substantially revised the Clean Air Act twice, and has substantially amended the very provisions at issue here, without questioning the interpretation long embraced by the D.C. Circuit and by EPA.[3] There is simply no reason for this Court to disturb the settled and well-grounded meaning of sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408-09.

2. Moreover, the D.C. Circuit's decision is plainly correct. The language, structure, and history of sections 108 and 109 of the Clean Air Act unambiguously preclude the consideration of factors other than an air pollutant's direct effects on public health and welfare when EPA sets the NAAQS for that pollutant.

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[3]Clean Air Act Amendments of 1977, sec. 401, § 108 (a)(1)(A), 91 Stat. 685, 790-91 (codified as amended at 42 U.S.C. § 7408 (1994)) (amending section 108 to confirm the authority of the Administrator to list criteria pollutants when, "*in his judgment*," they "*may reasonably be anticipated* to endanger public health or welfare") (emphasis added); Clean Air Act Amendments of 1977, sec. 106, § 109, 91 Stat. at 691 (amending section 109 to require the appointment of a scientific advisory committee to assist in reviewing the scientific basis for the NAAQS).

a. Section 109(b)(1) of the Clean Air Act requires NAAQS to be "*based on*" scientific criteria, which themselves must, according to section 108 of the Act, reflect "the latest scientific knowledge" regarding the "effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air . . ." 42 U.S.C. §§ 7409(b)(1) (emphasis added), 7408(a)(2). Section 109(b)(1) also provides that NAAQS must be "requisite to protect the public health," allowing an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). NAAQS "may be revised in the same manner as promulgated." 42 U.S.C. § 7409(b)(1). *See also* 42 U.S.C. § 7409(d)(1).

Thus Congress clearly specified that initial and revised NAAQS may only be "based on" the information developed in the criteria document, and that they must be "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). Where Congress specifies the factors to be considered, it is not up to the courts to introduce additional, unnamed, and unrelated factors into the statutory scheme. See, *e.g.*, *Union Electric Co. v. EPA*, 427 U.S. 246, 256-66 (1976). This point has particular force where, as here, many sections of the statute under consideration explicitly direct the agency's attention to costs and/or feasibility. See 42 U.S.C. §§ 7411(a)(1); 7411(h)(1); 7521(a)(2); 7521(a)(3)(A)(I); 7521(a)(3)(B)(I); 7521(a)(3)(D); 7545(c)(1)(B); 7571(b); 7585(b); 7590(a); *see also Union Electric*, 427 U.S. at 257, n. 5. Where Congress wanted EPA to consider such issues, Congress said so.

The structure of the NAAQS regulatory program confirms this reading of the statute. NAAQS are set by the EPA and implemented by the states. *Union Electric*, 427 U.S. at 249. Before the states develop their plans to implement the NAAQS, estimates of the overall costs of implementation and the distribution of those costs will be most speculative. In addition,

the Clean Air Act was deliberately designed to be a "technology-forcing" statute. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 91 (1975); *Union Electric*, 427 U.S. at 256-59. Given this purpose, it would make little sense to shrink the centerpiece of the Act – the NAAQS program – based on perceived technological infeasibility.

b. For their part, cross-petitioners assiduously avoid the complete language of the Act, and instead offer snippets drawn out of statutory context in order to support their construction of the Act. For example, cross-petitioners argue that because EPA may revise a NAAQS only as "appropriate," EPA may consider costs in the decision whether to revise a NAAQS (App. Pwr. Cross-Pet. at 15) – omitting the fact that the words "*in accordance with section 7408 of this title and subsection (b) of this section*" follow the word "appropriate" in the statute. 42 U.S.C. § 7409(d)(1) (emphasis added). Cross-petitioners also argue that section 108(b)(1) indicates that EPA may consider costs and feasibility in setting NAAQS because this section requires the agency to issue information regarding emission control technologies (App. Pwr. Cross-Pet. at 23) – omitting the fact that section 108(b)(1) by its plain terms distinguishes the information just described from the "criteria" on which the NAAQS are to be based. 42 U.S.C. § 7408(b)(1).

With nothing in the language to support them, cross-petitioners resort to reliance on bits and pieces of irrelevant legislative history. Cross-petitioners Appalachian Power, *et al.*, rely almost exclusively on statements in the 1967 and 1977 legislative record, largely bypassing the legislative history of 1970, the year in which Congress created the NAAQS program. (App. Pwr. Cross-Pet. 5, 6, 19-20, 21, 22.) Cross-petitioners ATA, *et al.*, likewise fix on the legislative history from 1977 rather than that from 1970. (ATA Cross-Pet. 23.) At best, these particular offerings from the legislative history of the

1977 Amendments present a glimpse into the post hoc attitudes of several members of Congress toward the statute that Congress had passed in 1970.[4]

Ironically, perhaps the most telling evidence of the clarity of sections 108 and 109 comes from cross-petitioners' and respondents' briefs. Having deprived themselves of the one interpretation that follows plainly from the language, structure, and history of the Act, cross-petitioners and respondents are quite at a loss to offer a consistent alternative interpretation. They variously argue that the Clean Air Act *permits* EPA to consider factors, such as cost and feasibility, beyond those the agency now considers (ATA Cross-Pet. 22; App. Pwr. Cross-Pet. 20); that the Act *requires* the agency to consider such additional factors (ATA Cross-Pet. 23; App. Pwr. Cross-Pet. 18, 22, 23); that the Act requires EPA to quantify risks before the agency may regulate them (Nat'l Stone Resp. 8-9); and that the Act either requires or permits cost-benefit analysis (ATA Cross-Pet. 26; Ohio Brief in Support 5). Cross-petitioners Appalachian Power, *et al.*, even offer an interpretation of the Act specially designed for cases in which the health effects of various pollution levels are purportedly "indistinguishable."[5]

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[4]The legislative history from 1970 confirms the lower court's, and EPA's, interpretation of the clear language of the Act. See PM Final Rule, 62 Fed. Reg. at 38,684-85.

[5]The question presented by Appalachian Power, *et al.*, rests on a factual premise unsupported by the ruling below – namely, that the health effects caused by ozone at the varying levels considered by EPA are "indistinguishable." (App. Pwr. Cross-Pet. I.) This fact-based argument constituted a major portion of Appalachian Power's arbitrary-and-capricious challenge to the ozone rule in the court below. However, the court did not reach the question whether the rule was arbitrary

The disarray among cross-petitioners and respondents as to the meaning of sections 108 and 109 shows the confusion that results once one's interpretation of a statute is cut loose from the language, structure, and history of the statute.

c. This same confusion also undercuts cross-petitioners' invocation of the canon counseling avoidance of constitutional questions as a basis for reinterpreting the Clean Air Act. (ATA Cross-Pet. I.) That canon plays no role where, as here, the statutory meaning is plain. In addition, the varied and conflicting statutory interpretations proffered by cross-petitioners do nothing to alleviate the constitutional question they have identified. Precisely because cross-petitioners lack any statutory basis for their competing interpretations, they do not identify any discernible statutory criteria for EPA's exercise of discretion under their various interpretations. Nor do they provide any such criteria for reviewing EPA's (permissible or mandatory, it is not clear which one) consideration of the additional factors they identify. Yet, absent such criteria, the constitutional claim they purport to avoid is, in fact, not redressed at all.

In short, cross-petitioners' reliance on a canon of constitutional avoidance is, like the entire cross-petition, no more than a thinly disguised effort to hitch an uncertworthy statutory question to a clearly certworthy constitutional question. Having failed for three decades to persuade Congress,

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and capricious. In the posture in which this case comes to this Court, this Court has no basis for assuming that the factual premise of cross-petitioners' question presented is correct, and thus the question as formulated is not properly presented at this time. The same basic points apply to cross-petitioners' frequent assertions that the risks found by EPA were "theoretical" or "hypothetical." (App. Pwr. Cross-Pet. 16.)

EPA, or the lower courts of the wisdom of their legal or policy claims that the NAAQS should be based on economic costs and feasibility, they now once again invite this Court to revisit this settled matter. Because the lower court's sound rejection of cross petitioners' claim is wholly independent of the important constitutional and statutory issues raised by the petitions, the Court should deny review on the issues raised by the cross-petitions, just as it has on numerous prior occasions. Nothing has changed.

CONCLUSION

The cross petitions for a writ of certiorari should be denied.

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